No. 76-964

In the
Supreme Court of the United States
OCTOBER TERM, 1976

RICHARD'S LUMBER AND SUPPLY COMPANY,
Petitioner,
vs.
KAUFMAN AND BROAD HOMES, INC., and
KAUFMAN AND BROAD HOME SALES, INC.,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

FREDERIC J. ARTWICK
SIDLEY & AUSTIN
One First National Plaza
Suite 4700
Chicago, Illinois 60603
(312) 329-5400
Attorney for Respondents,
Kaufman and Broad Homes, Inc. and
Kaufman and Broad Home Sales, Inc.

The Scheffer Press, Inc.—(312) 263-6850

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OPINIONS BELOW

No opinion was delivered by the court below with respect to the issues raised in this petition. An unpublished order was issued by the Seventh Circuit on September 20, 1976 pursuant to Circuit Rule 35. This order is found at Appendix A of the petition and is cited at 541 F.2d 284 (7th Cir. 1976) (Table).

Plaintiff petitioned for a rehearing, which was denied on October 14, 1976 in another unpublished order. This order is found at Appendix B of the petition.

In deciding to issue unpublished orders rather than opinions, the court below made the express finding that the case involved "arguments concerning the application of recognized rules of law, which are sufficiently substantial to warrant explanation but are not of general interest or importance." Circuit Rule 35(c)(2)(ii). (Pet. 16a).

In the court below, defendant United States Gypsum Company ("USG"), moved the Seventh Circuit to issue its first order as a published opinion. The Court agreed to publish only so much of it as dealt with the issue of USG's covenant not to sue. 545 F.2d 18 (7th Cir. 1976) (per curiam). It denied USG's motion insofar as it requested publication of the entire order, including that part which dealt with the issue raised in this petition.

Thus, it is clear that the Court of Appeals did not consider plaintiff's price-fixing claim to be of sufficient importance to publish as an opinion in the unofficial reports.

QUESTION PRESENTED

Does the second amended complaint state a claim for price-fixing upon which relief can be granted?

ARGUMENT

INTRODUCTION

The petition in this cause does not raise any of the considerations for granting certiorari which are set forth in Supreme Court Rule 19(1)(b). Plaintiff does not contend that the Seventh Circuit decision was in conflict with the decision of another Circuit or of this Court. Nor does plaintiff argue that the Court of Appeals decided an important question of federal law which has not been, but should be, decided by this Court. The only reason given by plaintiff why this court should exercise its discretion to grant certiorari is that the Circuit Court "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this court's power of supervision." (Pet. 29-30).

It is submitted by defendants that the dismissal of the complaint does not warrant an exercise of this court's supervisory power. The Court of Appeals considered the allegations fully and concluded that they did not allege interference with plaintiff's pricing independence, therefore a claim of price fixing was not stated. Plaintiff filed three successive complaints in the trial court, and he had ample opportunity to allege sufficient facts. Plaintiff was unable to do so, therefore the second amended complaint was properly dismissed.

Plaintiff has preserved only the price-fixing issue in the petition. He has not disputed the propriety of the decision which dismissed K&B for improper venue. He has not disputed the propriety of the decision granting USG summary judgment on the covenant issue. More-

over, in the courts below plaintiff abandoned all claims that the corporate discount between USG and K&B constituted an illegal tying arrangement or an attempt to monopolize. Plaintiff confined himself to the contention that the allegations of the complaint constituted price fixing.[1]

THE SECOND AMENDED COMPLAINT DOES NOT STATE A CLAIM OF PRICE FIXING

The corporate discount which was in effect between USG and K&B provided for the payment to K&B by USG of a variable sum based upon the retail price of wallboard purchased by the K&B subsidiaries. The Court of Appeals found (based upon the complaint and certain additional discovery documents included in the record by plaintiff) that K&B received no discount on wallboard purchased for less than $33 per thousand feet and received a high discount of five per cent on wallboard purchased for $36 per thousand feet.

The important point about the discount is that it was an arrangement between the manufacturer, USG, and the ultimate purchaser, K&B. It was not an arrangement with the plaintiff. Therefore, the arrangement did not, in the words of the Court of Appeals, impair plaintiff's "ability to sell in accordance with [his] own judgment." (Pet.

[1] In the district court plaintiff took the following narrow position:

> "Plaintiff concedes that the facts as pleaded do not constitute a tying agreement. Plaintiff will drop the charge of attempted monopolization as pleaded. This leaves price fixing as the only issue."

Plaintiff pursued only the price-fixing theory in the Court of Appeals, and is therefore confined to that theory in this Court.

16a). All the arrangement did, according to the complaint, was to permit USG to inflate the price of wallboard it sold to plaintiff. It did not interfere with plaintiff's freedom to charge whatever price it wanted to its purchasers.

In the petition for rehearing below and in the petition for a writ of certiorari, plaintiff has made much of the conclusory allegation in paragraph 17 of the complaint that because of the corporate discount, plaintiff's pricing independence was impaired. But there is no allegation of fact that plaintiff was forced by USG or by K&B to set his prices at or above a certain level. Rather, plaintiff alleges that he was forced to buy USG wallboard and sell it to K&B at a higher price than he would have purchased and resold wallboard not manufactured by USG. This does not amount to an allegation of price fixing. It amounts to an allegation that plaintiff chose to maintain a certain minimum profit margin on all the wallboard he sold at retail, no matter how high the wholesale price.

In its order denying rehearing (Pet. 18a), the Court of Appeals correctly distinguished between that part of the complaint (e.g. ¶4) which described the specific facts of the agreement and that part which described the effect of the agreement (e.g. ¶17). The court below stated:

> Nowhere in the specific allegations concerning the agreement is it alleged that USG [sic] was not free to price its wallboard as it chose. Nor do these allegations state that the conspiracy dealt in any way with the resale prices plaintiff set. Moreover, that could not have occurred without plaintiff's knowledge, and he alleges in paragraph 19 of the pleading that he did not learn of the terms of the conspiracy until after it had been going on for several years. In short, fairly read, plaintiff's complaint alleges a rebate agree-

> ment between K & B and USG which had the effect of allowing USG to charge higher prices because of the incentive it gave K & B for specifying USG wallboard and that the economic effect of the agreement was that plaintiff had to pay more and charge more for the wallboard it handled. This does not amount to a price-fixing agreement. (Pet. 18a).

Much confusion is created in the petition by plaintiff's failure to realize the difference between an illegal price fixing agreement in which plaintiff's freedom to set his retail price is impaired, and the legal corporate discount at issue here which merely raises the wholesale price of USG-manufactured wallboard. Nothing in the complaint suggests that plaintiff was not free to charge a retail price as little as one cent above the wholesale price or as much as $10 above the wholesale price. The choice to peg his retail price of USG wallboard at a certain level was entirely that of plaintiff's. Therefore, a claim of price fixing has not been stated.

Plaintiff does not argue that the authorities relied upon by the Court of Appeals are incorrect. He argues that they are distinguishable.

For instance, plaintiff contends that *Checker Motors Corp.* v. *Chrysler Corp.,* 405 F.2d 319 (2d Cir.), *cert. denied,* 394 U.S. 999 (1969) is distinguishable from the case at bar, because the corporate discount here is secret, it is not available to all purchasers, it was paid to a non-purchaser (K&B) and made applicable to a homogeneous product. These distinctions are meaningless. The point of *Checker Motors* is that the $183 rebate, like the USG-K&B corporate discount, did not affect the pricing independence of the retailer, therefore a claim for price fixing was not stated.

Similarly, in *Knuth* v. *Erie-Crawford Dairy Cooperative Association,* 326 F. Supp. 48, 53 (W.D. Pa. 1971), *modified on other grounds,* 463 F.2d 470 (3rd Cir. 1972), *cert. denied,* 410 U.S. 913 (1973), the rebate paid by defendant to the individual dairies did not in any way affect the resale price of milk which was charged by the dairies, therefore no claim of price fixing was proved. Plaintiff attempts (at 15) to distinguish *Knuth* on the grounds that Richards (unlike the dairies) did not receive any rebate and that it had no knowledge that the corporate discount was being paid to K&B. Again, the distinction is meaningless. The point of *Knuth* is that the rebate paid to the dairies, like the USG-K&B corporate discount, did not affect the retailers' freedom to set prices, therefore it did not constitute price fixing.

The Court of Appeals cited *Albrecht* v. *Herald Co.,* 390 U.S. 145 (1968) as an example of illegal resale price maintenance. A newspaper publisher imposed a suggested retail price on its independent carriers, and when a carrier offered the newspaper for sale at a greater price, the publisher sold its newspaper directly to the carrier's customers at the suggested retail price. This device by which the publisher interfered with the carrier's pricing independence was held to violate Section 1. As was implied by the Court of Appeals, the device is wholly different from the corporate discount between USG and K&B, which in no way affected plaintiff's freedom to set his retail prices.

Plaintiff makes an argument (at 17-19) not before found in this case. He argues that the Court of Appeals improperly invoked a "passing-on" defense. This is incorrect. The court below did not deal with the issue of the validity of any of K&B's defenses. It held that the complaint did

not state a claim for price fixing. The court therefore did not reach the issue of whether, if the complaint had stated a claim, damages were passed on.

Plaintiff mistakenly argues that the Court of Appeals has imposed a requirement of specificity in pleading which is unduly strict. According to the authority cited by plaintiff, all that was required was that the complaint:

> be "tested under the Sherman Act's general prohibition on unreasonable restraints of trade," [citation], and meet the requirement that petitioner has thereby suffered injury. *Radovich* v. *National Football League,* 352 U.S. 445, 453 (1957).

Neither of the requirements of *Radovich* has been met. Plaintiff neither alleged an unreasonable restraint of trade (price fixing) nor did he allege injury. With respect to the first requirement, the court below held that the failure to allege facts showing impairment of plaintiff's pricing independence precluded a finding of price fixing. With respect to the second requirement, plaintiff himself has recognized the shortcoming of his complaint in his petition to this Court:

> Plaintiff's complaint did not precisely set forth why or how he could sustain or suffer money damages by purchasing and reselling at an artificially high price. (Pet. 19).

Having failed to allege price fixing and resulting injury, plaintiff's complaint was properly dismissed.

Plaintiff's attempt (at 27-28) to characterize the decision of the court below as being founded upon a "target area" analysis is likewise misplaced. The parties argued the issue of standing in the Court of Appeals, but the point

was avoided in the decision. Nowhere in the orders of the Court of Appeals is there an indication that plaintiff lacked standing, therefore this argument is misplaced.

CONCLUSION

For the foregoing reasons, defendants respectfully request that the petition for a writ of certiorari in this cause be denied.

Respectfully submitted,

Frederic J. Artwick
Sidley & Austin
One First National Plaza
Suite 4700
Chicago, Illinois 60603
(312) 329-5400
Attorney for Respondents,
Kaufman and Broad Homes, Inc. and
Kaufman and Broad Home Sales, Inc.